

UGANDA / JUDGMENT

Edmund Akatukwasa v Gershom Kanyaraju and Anor - (HCT-00-CC-CS 1017 of 2004) [2006] UGCommC 23 (29 May 2006)

[2006] UGCommC 23

COURT

Commercial Court of Uganda

CASE / FILE NUMBER

HCT-00-CC-CS 1017 of 2004

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\par IN THE HIGH COURT OF UGANDA AT KAMPALA

\par (COMMERCIAL COURT DIVISION)

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\par HCT-00-CC-CS-1017-2004

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\par EDMUND AKATUKWASA ::::::::::::::: PLAINTIFF

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\par 1. GERSHOM KANYARUJU]

\par 2. DFCU LEASING CO. LIMITED] ::::::::::::::: DEFENDANTS

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\par

\par BEFORE: {\b\f36\fs28\ul\insrsid1319990\charrsid6252542 THE HONOURABLE MR. JUSTICE
YOROKAMU BAMWINE

\par

\par J U D G M E N T}{\b\f36\fs28\insrsid1319990 :

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\pararsid1319990 {\f36\insrsid1319990 THE plaintiff\rqoute

s main claim against the first defendant is for the recovery of US \$4000. That against the second
defendant is for the recovery of Shs.7,000,000-. Additiona{\f36\insrsid6252542 ll}
{\f36\insrsid1319990 y, he claims}{\f36\insrsid6252542

interest and costs of the suit. It is not disputed that the plaintiff and the first defendant were
friends and also that the first defendant was a customer to the second defendant. From the
evidence,

the two erstwhile friends entered into a contract in which the first defendant was to sell a vehicle to the plaintiff. At the time of the contract the vehicle had not arrived in Uganda.

The agreement was reduced in writing, P. Exh. XVIII. The contract price was Shs.30,000,000- out of which Shs.10,000,000- was paid on execution of the agreement. The remaining payments were conveniently phased.

The parties agreed that in case of failure to deliver the motor vehicle to the purchaser in Kampala for whatever

reason attributable to the vendor, the vendor would refund to the purchaser the full advance payment of Shs.10,000,000- and any further payment

s that the purchaser might have effected as a deposit outside the provisions of the agreement plus 30% interest

thereon per month. The seller defaulted. Following the default, the parties agreed, this time orally, that the seller refunds to the buyer all the money the buyer had deposited on the truck. It was by now Shs.15,000,000-.

The first defendant then requested the 2nd defendant, to whom the truck had been leased by the first defendant in breach of the

the contract between the plaintiff and the first defendant that it, the 2nd defendant, pays a sum of Shs.22,000,000- to the plaintiff. The second defendant agreed

in writing to do so. However, the 2nd defendant

defendant only paid a sum of Shs.15,000,000- and refused to pay the balance of Shs.7,000,000- claiming that this was the only money on their customer's account and that in any case the parties had agreed that the 1st

defendant pays the balance himself. Two cheques to the value of US \$4000 issued by the 1st defendant

to the plaintiff also bounced. The plaintiff's case is that following the 1st defendant's breach of the contract the parties agreed that the 1st

\f36\super\insrsid1313450\charrsid1313450 st}\f36\insrsid1313450 defendant pays him a sum of Shs.28,000,000-. That of this, the 1}\f36\super\insrsid1313450\charrsid1313450 st}\f36\insrsid1313450

defendant agreed to make a direct payment of Shs.6,000,000- to him and the balance of Shs.22,000,000- through the 2}\f36\super\insrsid1313450\charrsid1313450 nd}\f36\insrsid1313450 defendant. That since the 1}{

\f36\super\insrsid1313450\charrsid1313450 st}\f36\insrsid1313450 defendant did not have a shillings account, he issued to him two post dated cheques }\f36\insrsid4674303 in dollars }\f36\insrsid1313450

which unfortunately bounced. Hence the suit to recover the value of the two cheques}\f36\insrsid13570677 from the 1}\f36\super\insrsid13570677\charrsid13570677 st}\f36\insrsid13570677 defendant and Shs.7,000,000- from the second defendant.}{

\f36\insrsid15733329

\par }\f36\insrsid13570677 Three issues were framed for determination:

\par 1.\tab Whether the plaintiff is entitled to payment of US \$4000.

\par 2.\tab Whether the 2}\f36\super\insrsid13570677\charrsid13570677 nd}\f36\insrsid13570677 defendant is liable to pay Shs.7m to the plaintiff.

\par 3.\tab Whether the plaintiff is entitled to other reliefs sought.

\par

\par Mr. Nester Byamugisha for the plaintiff.

\par Mr. Edrin Mubiru for the 1}\f36\super\insrsid13570677\charrsid13570677 st}\f36\insrsid13570677 defendant.

\par Mr. Denis Owor for the 2}\f36\super\insrsid13570677\charrsid13570677 nd}\f36\insrsid13570677 defendant.

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\par Mr. Mubiru participated in the scheduling conference. He was also present when the plaintiff testified. He thereafter disappeared. His client never appeared at the hearing at all.

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\par The plaintiff\quote s case is that upon the 1}\f36\super\insrsid13570677\charrsid13570677 st}\f36\insrsid13570677 defendant failing to honour his contractual obligation to deliver the truck to him, they sat down again and agreed that he refu}{

\f36\insrsid4674303 nd}\f36\insrsid13570677 s all that the plaintiff had so far lost. Court is satisfied that this was in accordance with the contr

act document, P. Exh. XVIII. He contends that on calculating what was due to him, the amount came to Shs.37m and that after the 1{\f36\super\insrsid13570677\charrsid13570677 st}{\f36\insrsid13570677

defendant had explained to him the problems he had encountered in the deal, they finally settled for a sum of Shs.28,000,000- to be refunded to him. That they agreed further that the 2{\f36\super\insrsid13570677\charrsid13570677 nd}{

{\f36\insrsid13570677 defendant pays him a sum of Shs.22,000,000- on the 1}{\f36\super\insrsid13570677\charrsid13570677 st}{\f36\insrsid13570677 defendant\rqoute s behalf while the 1}{\f36\super\insrsid13570677\charrsid13570677 st}{\f36\insrsid13570677

defendant would personally meet the balance.

\par }{\f36\insrsid227875 I have duly studied the agreement between the parties, P.

Exh. XVIII, particularly clause 10 (i) thereof. Under that clause, the plaintiff was entitled to a refund of his Shs.15m plus interest of 30% per month for 5 months. By simple arithmetic, the maximum amount payable as }{\f36\insrsid4674303 interest as }

{\f36\insrsid227875 at June 2004 was Shs.22,500,000- (that is, Shs.){\f36\ul\insrsid227875\charrsid227875 15,000,000- x }{\f36\ul\insrsid1592796 30 x }{\f36\ul\insrsid227875\charrsid227875 5}{\f36\insrsid227875).

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\par Plus the Shs.15,000,000- which had so far been deposited, the amount recoverable by him under clause 10 (i) was Shs.37,500,000-.

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\par It is the plaintiff\rqoute s case that the amount was reduced to Shs.28,000,000- after the 1}{\f36\super\insrsid227875\charrsid227875 st}{\f36\insrsid227875

defendant had explained to him the financial difficulty he was in. I have considered the fact that the remedy for the breach following the total failure of consideration lay in the contract document itself, clause 10 (i) thereof.

I have also considered the fact that the two were friend}{\f36\insrsid4674303 s}{\f36\insrsid227875 ; and that the amount}{\f36\insrsid15553767 was not enhanced but reduced favourably to the 1}{\f36\super\insrsid15553767\charrsid15553767 st}{

{\f36\insrsid15553767 defendant\rqoute s advantage; and }{\f36\insrsid4674303 also }{\f36\insrsid15553767 the fact that the 1}{\f36\super\insrsid15553767\charrsid15553767 st}{\f36\insrsid15553767 }{\f36\insrsid11025028 defendant has}{\f36\insrsid4939974

opted not to be heard in his defence. I have found no reason for Court to doubt the plaintiff's sincerity in the matter. The plaintiff's evidence is logical and supported by the contract document itself. Court is satisfied on the balance of probabilities that the parties orally agreed that a sum of Shs.28,000,000- be paid by the plaintiff to the defendant as a condition for his discharge from the breach.

In view of the above finding, I shall now proceed to consider the specific issues framed for Court's determination.

First, whether the plaintiff is entitled to payment of US \$4000.

I have considered the plaintiff's evidence that the two cheques were issued to him by the plaintiff in settlement of an additional Shs.6,000,000- to make a total of Shs.28,000,000-. This much was not reduced in writing. However, in law, where a contract is made orally, the terms of it can be proved by oral evidence, normally by the person claiming that there is a contract.

I have seen the two cheques, P. Exh. IV and P. Exh. V. It is the plaintiff's evidence that the plaintiff told him that he did not have a shillings account and so issued him the two post-dated cheques in dollars. The plaintiff's evidence is that the defendant did not deny the fact of issuing those cheques in his written statement of defence.

. There is evidence that both cheques bounced. The obligation of the drawer of the cheque which was to settle a debt owed by him to the plaintiff was not honoured or fulfilled. When a bill is dishonoured by non-payment,

\f36\insrsid6446429 an immediate right of recourse accrues to the holder. Therefore, the cause of action arose in favour of the plaintiff when the cheques were dishonoured. The plaintiff has proved that the 1}\f36\super\insrsid6446429\charrsid6446429

st}\f36\insrsid6446429 defendant owed him a debt. He opted to settle it by cheques and those cheques bounced. The plaintiff is entitled to the value of those 2 cheques. I so find.}\f36\insrsid5720305

\par }\f36\insrsid6446429 Second, whether the second defendant is liable to pay Shs.7m to the plaintiff. }\f36\insrsid16007532

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\par }\f36\insrsid6446429 The story here is a long one. From the evidence, the 1}\f36\super\insrsid6446429\charrsid6446429 st}\f36\insrsid6446429 defendant wrote to the 2}\f36\super\insrsid6446429\charrsid6446429 nd}\f36\insrsid6446429 defendant}{

\f36\insrsid14515485 \rquote }\f36\insrsid6446429 s General Manager requesting that part of the funds accruing to him on the lease agreement for the truck be passed on to the plaintiff. The plaintiff agreed to this arrangement and so did the 2}{

\f36\super\insrsid6446429\charrsid6446429 nd}\f36\insrsid6446429 defendant. To be double sure, the plaintiff\rquote s lawyers sought confirmation from the 2}\f36\super\insrsid6446429\charrsid6446429 nd}\f36\insrsid6446429

defendant about its promise to settle the 1}\f36\super\insrsid6446429\charrsid6446429 st}\f36\insrsid6446429 defendant\rquote

s obligations to the plaintiff. The second defendant confirmed so, in writing to them. From all this evidence, it is clear to me that the}\f36\insrsid10778615 2}\f36\super\insrsid10778615\charrsid10778615 nd}\f36\insrsid10778615

defendant without any pressure from any quarter guaranteed payment of Shs.22m to the plaintiff on the 1}\f36\super\insrsid10778615\charrsid10778615 st}\f36\insrsid10778615 defendant\rquote

s behalf. They had reason to do so because they had taken over the vehicle that had been meant for the plaintiff. That was enough motivation. Why then have they decided to renege on their promise? According to DW1 Mukasa, the first de

fendant had also instructed them to pay a one Kaya. That upon paying the said Kaya, only Shs.15m remained on the account. They have not produced any statement of account to substantiate that allegation. Since the purported instruction from the 1}{

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dant to pay Kaya preceded that of paying the plaintiff, no reason has been given as to why they made an un reserved commitment to the plaintiff to pay him fully. They were better placed to know whether the two instructions could be complied with.}}

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\par DW1 Mukasa}{\f36\insrsid8592639 has also talked of 1}
{\f36\super\insrsid8592639\charrsid8592639 st}{\f36\insrsid8592639 defendant\rqote s
instructions to them to pay only Shs.15m. The letters are on record as attachments to }
{\f36\insrsid13459141

P. Exh. XV and P. Exh. XVII but each has no any indication on it that it was ever received by the 2}
{\f36\super\insrsid13459141\charrsid13459141 nd}{\f36\insrsid13459141 defendant and acted
upon. In my view, that bit about the 1}{

\f36\super\insrsid13459141\charrsid13459141 st}{\f36\insrsid13459141 defendant re-instructing
them to pay le}{\f36\insrsid7221618 s}{\f36\insrsid13459141 s than had been originally agreed
upon was an afterthought.}{\f36\insrsid12464167

It appears to me that after the 1}{\f36\super\insrsid12464167\charrsid12464167 st}
{\f36\insrsid12464167 defendant had made a commitment to pay the plaintiff through the 2}
{\f36\super\insrsid12464167\charrsid12464167 nd}{\f36\insrsid12464167

defendant and after the 2}{\f36\super\insrsid12464167\charrsid12464167 nd}{\f36\insrsid12464167
defendant had confirmed the commitment, he (1){\f36\super\insrsid12464167\charrsid12464167
st}{\f36\insrsid12464167 defendant) secretly went to the 2}{

\f36\super\insrsid12464167\charrsid12464167 nd}{\f36\insrsid12464167 defendant and stopped the
full payment. Such stoppage was }{\f36\insrsid9726051 in my view fraudulent and inoperative.
That the two cheques were }{\f36\insrsid11025028 issued at}{

\f36\insrsid9726051 the time the parties agreed that the plaintiff be paid by the 2}
{\f36\super\insrsid9726051\charrsid9726051 nd}{\f36\insrsid9726051 defendant}
{\f36\insrsid1861158

is discernable on the dates thereon. One is dated 23/7/2004 and the other 23/8/2004, implying that
since they were post dated, the time of issue was on or around 23/6/2004. This in my view is
further circumstantial evidence that supports the plaintiff

\rqote s story that at the time the 2}{\f36\super\insrsid1861158\charrsid1861158 nd}
{\f36\insrsid1861158 defendant promised to pay Shs.22m on 1}
{\f36\super\insrsid1861158\charrsid1861158 st}{\f36\insrsid1861158 defendant\rqote s behalf, the
1}{

\f36\super\insrsid1861158\charrsid1861158 st}{\f36\insrsid1861158 defendant also undertook to
pay a sum of Shs.6,000,000- directly to him.}{\f36\insrsid737664 This in my view destroys the 2}
{\f36\super\insrsid737664\charrsid737664 nd}{

defendants evidence that the two cheques were issued after the parties had realised that the whole amount could not be paid by the 2} {f36\super\insrsid737664\charrsid737664 nd}{f36\insrsid737664 defendant.}{f36\insrsid10778615

{f36\insrsid737664

I have directed my mind to the issue of NOVATION raised by counsel for the plaintiff. As a general rule li

abilities under a contract cannot be assigned. However, they can be assigned with the consent of the other party to the contract. This is what is known in law as Novation. Thus novation is the only method by which the original obligor can be effective

y replaced by another.

What then is novation? In Cheshire, Fifoot & Furmston's Law of contract, 14} {f36\super\insrsid737664\charrsid737664 th}{f36\insrsid737664 Edition at p. 577, the learned editors define it thus:

{f36\insrsid11222005\charrsid13570253 '93Novation is a } {i\i f36\insrsid9532094\charrsid13570253 transaction by}{

{f36\insrsid11222005\charrsid13570253 which, with the consent of all the parties concerned, a new contract i

s substituted for one that has already been made. The new contract may be between the original parties, e.g. where a written agreement is later incorporated in a deed; or between different parties, e.g. where a new person is substituted for the original

debtor or creditor.'94

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From the evidence, it is this last form, the substitution of one debtor for another, that concerns us in this case.

George {f36\insrsid2752825 Kanyaraju, the 1}{f36\super\insrsid2752825\charrsid2752825 st} {f36\insrsid2752825 defendant, owed Shs.22,000,000- to Edmund Akatukwasa, the plaintiff. Under the lease transaction}{f36\insrsid16392016 between the 2}{

{f36\super\insrsid16392016\charrsid16392016 nd}{f36\insrsid16392016 defendant and the said Kanyaraju, the 2}{f36\super\insrsid16392016\charrsid16392016 nd}{f36\insrsid16392016 defendant owed money to }{f36\insrsid7221618 Kanyaraju}{

\f36\insrsid16392016 . The three parties agreed between themselves that the amount owed by Kanyaruju to Akatukwasa be paid by the 2}\f36\super\insrsid16392016\charrsid16392016 nd}\f36\insrsid16392016 defendant to Akatukwasa. To show the serious

ness of that commitment, the 2}\f36\super\insrsid16392016\charrsid16392016 nd}\f36\insrsid16392016 defendant not only made a confirmation of the fact to the plaintiff\quote s lawyers but also made a part payment in the sum of Shs.15,000,000-. The plaintiff now seeks to enforce the payment of the balance. The law as contained

in S. 3 (1) of the Contract Act, Cap 73, is that no suit is maintainable on certain guarantees or representations unless they are in writing and signed by the party chargeable. It provides:}\f36\insrsid11222005

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t upon any special promise to answer for the debt, default or miscarriage of another person unless the agreement upon which the suit is brought, or some memorandum or note of the agreement, is in writing and signed by the party to be charged with it or so

me other person lawfully authorized by him or her to sign it.\'94

\par }\pard \qj \li0\ri0\sl480\smult1\widctlpar\aspalpha\aspnum\faauto\adjustright\lin0\lin0\itap0\pararsid1319990 {\f36\insrsid3933530

\par It has not been argued that Nsubuga who made the commitment on behalf of the 2}\f36\super\insrsid3933530\charrsid5992681 nd}\f36\insrsid5992681

defendant lacked the capacity to do so. I do understand the law to be that a transaction of this nature is not effective as NOVATION unless an intention is }\f36\insrsid9532094 clearly}\f36\insrsid5992681

shown that the debt from A to B is to be extinguished. In my view the decision to reduce the commitment in writing }\f36\insrsid4663565 was in the spirit of}\f36\insrsid5992681 S. 3 (1) of the Contract Act. It was sufficient demonstration of

the second defendant\quote s serious commitment to settle the debt on the 1}\f36\super\insrsid5992681\charrsid5992681 st}\f36\insrsid5992681 defendant\quote s behalf. }\f36\insrsid4663565 The first defendant}\f36\insrsid5992681

was after all their client. That commitment could in my opinion only be revoked upon the same three parties sitting down together and agreeing to do so. The unilateral withdrawal}\f36\insrsid9383316 }\f36\insrsid7239743 by 2}\f36\insrsid7239743

\f36\super\insrsid7239743\charrsid7239743 nd}\f36\insrsid7239743 defendant }\f36\insrsid9383316

was ineffective. The principle contained in S. 3 (1) of the Contract Act has been interpreted to apply whether the liability guaranteed is contractual or tortious. It applies where a third party, as herein, promises to the creditor to pay the debt. It does not apply where the third party's promise is to the debtor. See LAW OF CONTRACT IN UGANDA by David J. Bakibinga at page 61. In all these circumstances, it appears to me that whether the issue is

approached from the point of view of the doctrine of NOVATION or of contracts of Guarantee, the plaintiff's claim against the defendant

defendant in respect of the Shs.7,000,000- is unassailable. I hold so.

Third, whether the plaintiff is entitled to the other reliefs sought.

He has prayed for interest of 30% per annum on the US \$2000 from the date of dishonour of each cheque till payment in full. This is as regards the 1st

defendant. As regards the 2nd defendant, he has prayed for interest at the same rate

per annum from the date of payment of Shs.15m till payment in full. This was a business transaction. The plaintiff expected to earn a living out of the original contract. After the breach, he expected to be compensated

for it and forget all about it. The basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant

has had the use of it himself; so he ought to compensate him accordingly.

In the instant case, the plaintiff has been wrongfully denied the use of money that was rightfully his. It is necessary that he be compensated for that loss. No damages for breach of contract have been asked for and/or awarded to the plaintiff. I would

award him interest on the two awards. For the award against the 1st defendant in the sum of Shs.6,000,000- , and for the award against the 2nd defendant in the sum of Shs.6,000,000- ,

the equivalent of US \$4000 at the then exchange rate of Shs.1500- per dollar}
{\f36\insrsid12671027 , interest at the rate of 25% per annum shall be paid from the date of the dishonour of the last cheque (i.e. 28/09/2004) till payment i

n full. As for the award against}{\f36\insrsid9056016 the 2}
{\f36\super\insrsid9056016\charrsid9056016 nd}{\f36\insrsid9056016 defendant, interest at the same rate of 25% per annum shall be computed from the date when the 2}{

\f36\super\insrsid9056016\charrsid9056016 nd}{\f36\insrsid9056016 defendant }
{\f36\insrsid4084901 defaulted on}{\f36\insrsid9056016 the payment of Shs.}{\f36\insrsid4084901 7,000,000-}{\f36\insrsid9056016 (i.e. 06/07/2004) till payment in full.}{

\f36\insrsid15886165

\par }{\f36\fs16\insrsid6442506\charrsid7239743

\par }{\f36\insrsid8922672 As regards costs, the usual result is that the loser pays the winner\quote

s costs. A successful party should only be denied costs if it is proved that but for his conduct, the action would not have been brought. I have found no fault on the part of the plaintiff to warrant denial of the costs to him. He will be paid the }}

\f36\insrsid8281740 taxed }{\f36\insrsid8922672 costs of the suit}{\f36\insrsid8281740 , one half by the 1}{\f36\super\insrsid8281740\charrsid8281740 st}{\f36\insrsid8281740 defendant, the other half by the 2}{\f36\super\insrsid8281740\charrsid8281740 nd

}{\f36\insrsid8281740 defendant.}{\f36\insrsid8922672

\par }{\f36\fs16\insrsid8922672\charrsid7239743

\par }{\f36\insrsid8922672 It shall be so.

\par

\par Yorokamu Bamwine

\par }{\b\f36\insrsid8922672\charrsid8922672 J U D G E

\par }{\f36\insrsid8922672 30/5/2006

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\par }{\f36\insrsid7239743 30/5/2006}{\f36\insrsid9056016

\par }{\f36\insrsid7239743 Nester Byamugisha for plaintiff.

\par Denis Owor for defendants.

\par }{\f36\fs16\insrsid7239743\charrsid7239743

\par }{\b\f36\insrsid7239743\charrsid7239743 Court:}{\f36\insrsid7239743 Judgment delivered.

\par

\par Yorokamu Bamwine

\par {{b\36\insrsid7239743\charrsid7239743 J U D G E

\par {{\36\insrsid7239743 30/5/2006}}{\36\insrsid7239743\charrsid1319990

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